IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33898

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AS SUBSCRIBING POLICY NO.: B0711,
Appellants,

v.

PINNOAK RESOURCES, LLC AND PINNACLE MINING CO., LLC,
Appellees.

APPELLEES' BRIEF

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I. COUNTERSTATEMENT OF THE CASE

At issue in this appeal is whether the Circuit Court erred in concluding that the claim of Appellants Certain Underwriters at Lloyd's, London (more specifically the "Heritage and Talbot" syndicates thereof) against Appellees PinnOak Resources, LLC and Pinnacle Mining Co., LLC (collectively, "PinnOak"), for breach of a contract allegedly entered into in 2004, is barred by a "Global Settlement Agreement and Release" the parties subsequently entered into in 2006. As discussed below, the Circuit Court's rulings were mandated by the application of West Virginia law to the pertinent facts of this dispute, none of which are now or ever have been in dispute for present purposes, as discussed herein.[1] As such, the Circuit Court's rulings must be upheld.

A. The Coverage Action and the "Global Settlement Agreement and Release"

PinnOak owns and operates the Pinnacle Mine, a coal mine in Wyoming County, West Virginia. As a result of a series of methane ignitions that began on August 31, 2003, PinnOak sustained business interruption and property damages losses at the Pinnacle Mine ("August 2003 Loss").[2]

In February 2004, PinnOak filed a complaint in the Circuit Court in Wyoming County against its various insurers, seeking coverage for the August 2003 Loss under insurance policies having a policy period of June 2003-2004 ("Coverage Action"). Heritage and Talbot, who were

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[1] PinnOak is assuming the facts alleged in Appellants' First Amended Complaint to be true solely for purposes of its motion in the Circuit Court, the Circuit Court's rulings and this appeal.

[2] First Amended Complaint, ¶ 7. In June 2007, PinnOak was acquired by Cleveland-Cliffs Inc.

among those insurers, were named defendants in the Coverage Action, along with other Lloyd's syndicates and other insurers.[3]

After extensive litigation, the Coverage Action was settled on May 30, 2006, when the parties entered into a "Global Settlement Agreement and Release." Heritage and Talbot were parties to the Global Settlement Agreement and Release and paid their share of the settlement sum.[4]

B. The Subsequent Breach of Contract Action

In October 2006, months after the parties had entered into the Global Settlement Agreement and Release, Heritage and Talbot filed a complaint against PinnOak in the Circuit Court of Wyoming County. After PinnOak filed a motion to dismiss that complaint, Heritage and Talbot filed a First Amended Complaint on December 13, 2006. In their First Amended Complaint, Heritage and Talbot allege that in June 2004 – in the midst of the Coverage Action and nearly *two years before* entry into the Global Settlement Agreement and Release – they and PinnOak had agreed to renewal insurance coverage incepting June 30, 2004 and expiring five years later on June 30, 2009.[5] According to Heritage and Talbot, this renewal agreement was memorized in a written policy slip ("Policy Slip"), and the renewal coverage was known as "Policy B0711."[6]

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[3] First Amended Complaint, ¶ 7.

[4] First Amended Complaint, ¶ 7.

[5] First Amended Complaint, ¶ 9.

[6] First Amended Complaint, ¶ 10. The Policy Slip is attached as Exhibit A to the First Amended Complaint.

According to the provisions of the Policy Slip, in return for this renewal coverage, PinnOak would pay (a) $375,000 for each year of coverage, and (b) an additional $6.25 million in five annual installments of $1.25 million, with the first installment due "on settlement of the August 2003 loss."[7] That latter sum is referred to in the Policy Slip as a "payback," as discussed below. The Policy Slip also states that, in the event of a non-renewal of the coverage in any given year, the entire "payback" becomes payable in full.[8]

PinnOak paid the initial $375,000, but in June 2005, after one year of coverage, PinnOak elected not to renew the Slip coverage.[9] Nearly a year later, in May 2006, the parties entered into the Global Settlement Agreement and Release, that on its face was intended to fully and finally resolve all dealings between the parties.[10] Despite this global resolution of all claims, Heritage and Talbot initiated the present litigation, claiming that PinnOak breached the provisions of the Policy Slip by failing to pay Heritage and Talbot their share of the $6.25 million "payback" that allegedly became due on settlement of the Coverage Action.

C. PinnOak's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment on the Breach of Contract Claim

On December 28, 2006, PinnOak filed a motion to dismiss, or in the alternative, for summary judgment on the breach of contract claim set forth in the First Amended Complaint and placed into evidence, as part of that motion, the Global Settlement Agreement and Release.[11]

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[7] First Amended Complaint, ¶ 12.

[8] First Amended Complaint, ¶ 12.

[9] First Amended Complaint, ¶¶ 13-14.

[10] First Amended Complaint, ¶ 7.

[11] A copy of the Global Settlement Agreement and Release is attached as Exhibit A to the Affidavit of Peter N. Flocos, Esq., which is attached as Exhibit 1 to PinnOak's Memorandum in Support of PinnOak's

(Footnote continued on next page...)

PinnOak's motion was based on the only reasonable interpretation possible of the documents at issue. Specifically, PinnOak argued that multiple provisions of the May 2006 Global Settlement Agreement and Release clearly and unambiguously barred the Heritage/Talbot "payback" claim under the June 2004 Policy Slip given the clear relationship on the face of the Slip between the "payback" and what eventually became, under the Global Settlement Agreement and Release, the Coverage Action settlement sum.[12]

Indeed, the June 2004 Policy Slip repeatedly refers to the payments scheduled thereunder as a "payback" relating to the settlement of the August 2003 Loss, which settlement occurred years later in May 2006. For example:

- Under the "PREMIUM" heading, the Policy Slip provides that the "***Payback*** Annual" is "payable on ***settlement of the August 2003 loss***";
- Under the "CONDITIONS" heading, the Policy Slip provides that the first installment of $1.25 million is due "after ***settlement of the August 2003 loss***." This section also provides that, in the event of a non-renewal, "the full ***payback*** becomes payable in full";
- Under the "BROKERAGE" heading, the Policy Slip states that no brokerage fee would be payable "in respect of ***Payback***"; and
- Under the Talbot stamp, the Policy Slip states "IRO ***PAYBACK*** PREMIUM."[13]

PinnOak further argued that, because of the clear relationship on the face of the Policy Slip between the "payback" and the settlement of the August 2003 Loss, any claim for failure to

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Motion to Dismiss Plaintiffs' First Amended Complaint ("Memorandum in Support of Motion to Dismiss").

[12] Memorandum in Support of Motion to Dismiss, generally.

[13] First Amended Complaint, Exhibit 1 (emphasis added).

make the "payback" was barred by multiple provisions of the Global Settlement Agreement and Release, specifically:

- An entire agreement/merger clause, which expressly provides that the Global Settlement Agreement and Release "supersedes all other prior discussions, agreements and understandings" of the parties;
- An anti-reimbursement/contribution provision specifically barring Heritage and Talbot from seeking "under any legal theory . . . reimbursement of, or contribution toward," the settlement sum; and
- A general release by Heritage and Talbot of all claims which they "ever had, now have or hereafter can, shall or may have, for, upon or by reason of" the August 2003 Loss.[14]

In opposing PinnOak's motion, Heritage and Talbot attempted to make various legal arguments, including the argument that "payback" meant payback by PinnOak of a premium. Although obscure (given that PinnOak was the insured and insureds do not receive premiums that can be "paid back"), that argument nevertheless acknowledged that under the Policy Slip the "payback" was to be funded by what became the Coverage Action settlement sum.

Notably, moreover, Heritage and Talbot's opposition to PinnOak's motion failed to include any affidavits or other evidence in support thereof, nor did Heritage and Talbot file an affidavit supporting a claim for a discovery continuance as required by W.Va.R.Civ.P. 56(f). The opposition did, however, seek permission from the Circuit Court to submit an affidavit from Simon White of the Heritage syndicate, whom Heritage and Talbot claimed "was personally

[14] Memorandum in Support of Motion to Dismiss, pp. 7-13.

involved in the negotiations of the 2004-2009 [slip] policy and can show that Heritage and Talbot's current breach of contract claim did not arise out of the August 2003 loss."[15]

At the February 23, 2007 hearing on PinnOak's motion, the Circuit Court informed Heritage and Talbot that it might treat the motion as one for summary judgment and allowed them the time they wanted to submit their desired affidavit from Mr. White. Heritage and Talbot expressly agreed to that arrangement on the record at the hearing.[16]

On March 15, 2007, Heritage and Talbot submitted an affidavit of Simon White ("White Affidavit"). It was evident from the face of that Affidavit that Mr. White had little pertinent personal knowledge and largely was quarreling with PinnOak's legal analysis. For example, Mr. White made no claim to have participated in (a) the 2004 Policy Slip "payback" discussions at issue in the First Amended Complaint, (b) the drafting of the Policy Slip, or (c) any of the 2006 discussions that resulted in the Global Settlement Agreement and Release.[17] Moreover, Mr. White expressly admitted that, under the Policy Slip, what he referred to as the "payback" premium was "triggered" by the settlement, and also that the "payback" was to be funded by the Coverage Action settlement proceeds eventually received by PinnOak:

> [T]he parties agreed that PinnOak would pay the additional premium [under the June 2004 Policy Slip] after settlement of [the] August 31, 2003 loss because PinnOak would have then ***received settlement funds and would then have the cash available to pay the additional premium***.[18]

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[15] Heritage and Talbot's Opposition to Motion to Dismiss Plaintiffs' First Amended Complaint ("Opposition to Motion to Dismiss"), p. 8.

[16] February 23, 2007 Hearing Transcript, pp. 20-21, 25.

[17] White Affidavit, generally.

[18] White Affidavit, ¶ 7 (emphasis added).

Appellants' Brief makes these same types of statements.[19]

By Order dated April 7, 2007 and entered April 11, 2007, the Circuit Court treated PinnOak's motion as one for summary judgment and granted summary judgment in PinnOak's favor on the breach of contract claim asserted against it by Heritage and Talbot in the First Amended Complaint ("Summary Judgment Order"). In reaching its conclusion, the Circuit Court expressly considered the White Affidavit (contrary to Appellants' present suggestions), but correctly noted that Mr. White had little pertinent personal knowledge and was largely offering legal argumentation.[20]

The Circuit Court also found that under the only reasonable interpretation of the documents at issue, Heritage and Talbot's "payback" claim under the June 2004 Policy Slip was barred by the multiple-provisions of the May 2006 Global Settlement Agreement and Release quoted previously, because of the clear relationship on the face of the Policy Slip between the "payback" and what eventually became the Coverage Action settlement sum (a relationship confirmed by the White Affidavit in any case).[21]

The Circuit Court also found that a fourth provision of the Global Settlement Agreement and Release – an indemnification provision providing that Heritage and Talbot would indemnify PinnOak for any claim resulting even "indirectly" from the August 2003 Loss – was further

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[19] Appellants' Brief, pp. 9, 12-13, 16, 18, 20.

[20] Summary Judgment Order, ¶ 19.

[21] Summary Judgment Order, ¶ 28-31.

evidence of the parties' intent to fully and finally resolve all prior claims and issues among them, including the "payback" identified in the Policy Slip.[22]

D. Heritage and Talbot's Rule 59(e) Motion

On April 27, 2007, Heritage and Talbot filed a Rule 59(e) Motion to Alter or Amend the Circuit Court's Summary Judgment Order ("Rule 59(e) Motion").[23] No affidavit or other evidence was submitted with the Rule 59(e) Motion – contrary to the impression Heritage and Talbot presently attempt to create – nor did that motion include a request for more discovery under Rule 56(f). PinnOak responded to the Rule 59(e) Motion[24] and the Circuit Court subsequently scheduled oral argument for June 15, 2007.

Less than forty-eight hours before that argument, Heritage and Talbot suddenly submitted a new affidavit – from Leslie Rock of the Heritage syndicate ("Rock Affidavit"). The Rock Affidavit, while continuing to make the obscure argument about a "payback" premium, nevertheless admitted, as had the White Affidavit, that the "payback" was "triggered" by the settlement and also that the "payback" was to be funded by the Coverage Action settlement proceeds eventually received by PinnOak:

> [T]he parties agreed that PinnOak would pay the additional premium [under the June 2004 Policy Slip] after settlement of [the] August 31, 2003 loss because PinnOak would have then ***received settlement funds and would then have the cash available to pay the additional premium***.[25]

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[22] Summary Judgment Order, ¶ 30.

[23] Heritage and Talbot mistakenly labeled their motion a Rule 56(e) motion. PinnOak will refer to it herein as a Rule 59(e) motion.

[24] Defendants' Opposition to Plaintiffs' Motion to Alter or Amend the Court's April 11, 2007 Judgment.

[25] Rock Affidavit, ¶ 6 (emphasis added).

After oral argument, at which the Rock Affidavit was discussed, the Circuit Court rejected the Heritage and Talbot Rule 59(e) motion by Order dated June 21, 2007, and this appeal followed.

II. ARGUMENT

A. Standard of Review and Summary of Argument

Heritage and Talbot's assertion that this Court should review the Circuit Court's rulings *de novo* is simply incorrect under West Virginia law. Appellants' Brief, p. 15. Instead, in reviewing a summary judgment motion based on a settlement agreement, this Court held in *Berardi v. Meadowbrook Mall Company* that:

> Our review here is further circumscribed because it involves a settlement agreement and we have said that, "when this Court undertakes the appellate review of a circuit court's order enforcing a settlement agreement, an ***abuse of discretion*** standard of review is employed."

212 W.Va. 377, 381-82, 572 S.E.2d 900, 904-05 (2002) (citing *DeVane v. Kennedy*, 205 W.Va. 519, 527, 519 S.E.2d 622, 630 (1999)) (emphasis added) (noting also that "settlements are highly regarded and scrupulously enforced"). Like the present case, *Berardi* involved appellate review of a Circuit Court's ruling granting summary judgment in favor of the defendants on the basis that the claims asserted by plaintiffs in the litigation were barred by the terms of a prior settlement agreement between the parties. 212 W.Va. at 380-81, 572 S.E.2d at 903-04.

Pursuant to this Court's holdings in *Berardi* and *DeVane*, this Court should employ an abuse of discretion standard when reviewing the rulings of the Circuit Court (notably, Judge Hrko heard both the Coverage Action and the present action).

Even if, however, *de novo* review were appropriate (and it is not), the Circuit Court's rulings below nevertheless must be upheld. As discussed below, the only reasonable interpretation of the documents is that the "payback" claim under the June 2004 Policy Slip is

barred by multiple provisions of the May 2006 Global Settlement Agreement and Release, even under the version of history offered by Heritage and Talbot. Heritage and Talbot's arguments to the contrary raise no genuine issues of material fact and must be rejected.[26]

Heritage and Talbot's position in this case is little other than a turning backwards of the plain language of the documents, the rules of procedure, evidence and contract law, and the proceedings below. Indeed, it is curious that although the First Amended Complaint suggests that other Lloyd's syndicates or insurers joined the Policy Slip in addition to Heritage and Talbot, no other syndicates or insurers have made any claim against PinnOak or otherwise been heard from in this proceeding.[27]

The face of the documents reveals – and Heritage and Talbot's own purported witnesses expressly admit – that the "payback," whatever it may have been, was to be funded by what became the settlement amount. That fact ***alone*** means the "payback" claim is barred by the three above-quoted provisions of the Global Settlement Agreement and Release – none of which are ever actually analyzed in the "Discussion of Law" portion of Heritage and Talbot's Brief – ***regardless*** of whatever other discourses Heritage and Talbot wish to engage in regarding their view of the meaning of the term "payback."

Similarly, although tasking PinnOak for not submitting affidavits to the Circuit Court, Heritage and Talbot ignore that (a) PinnOak submitted the key material evidence – the Global Settlement Agreement and Release, the text of which is undisputed – with its motion, (b) the

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[26] It should be noted that, under West Virginia law, "summary judgment may be sustained on any basis supported by the record." *Subcarrier Communications v. Nield*, 218 W.Va. 292, 297, 624 S.E.2d 729, 734 (2005).

[27] The First Amended Complaint states repeatedly that Heritage and Talbot had only a 40% share of the Slip and are suing for that share only. *See* First Amended Complaint, ¶¶ 11, 15.

First Amended Complaint attached the remaining evidence, namely the Policy Slip, and (c) the parol evidence rule prohibits using witness testimony to vary the terms of those documents or to create an ambiguity. Heritage and Talbot do not even directly claim that some pertinent ambiguity exists, making even more peculiar their criticism of the Circuit Court for reading and enforcing the terms of the documents as written. Rather, Heritage and Talbot simply insist the Circuit Court was wrong, although as noted their own documents and witnesses confirm the essentials of the Circuit Court's analysis.

Perhaps most unfairly, Heritage and Talbot also insinuate that the Circuit Court is somehow to blame for rushing to judgment and not giving an opportunity for evidence to be submitted. In fact, however, the Circuit Court gave every such opportunity, and Heritage and Talbot failed utterly to meet the Rule 56 summary judgment obligations that this Court has made very clear must be met in order to avoid summary judgment. Heritage and Talbot's attempt to make this Court (and the Circuit Court before it) feel like it lacks sufficient understanding of some magical and sophisticated aspect of the London insurance market must be rejected, because the actual record reveals that there is no genuine factual or legal issue in dispute.

B. The Circuit Court Did Not Abuse Its Discretion in Finding that Heritage and Talbot's Breach of Contract Claim against PinnOak is Barred by the Global Settlement Agreement and Release

1. As the Circuit Court Found, the "Entire Agreement/Merger" Clause in the Global Settlement Agreement and Release Supersedes the Alleged Payback Agreement Among PinnOak, Heritage and Talbot

The "entire agreement/merger" clause in the Global Settlement Agreement and Release clearly and unambiguously provides that:

> This agreement constitutes the entire agreement between PinnOak, Insurers, and VeriClaim regarding the subject matter hereof, and ***supersedes all other prior discussions, agreements and understandings***, both written and oral, with respect thereto.

Global Settlement Agreement and Release, ¶ 10 (emphasis added).

Heritage and Talbot's present breach of contract claim under the Policy Slip for the "payback" clearly relates to the August 2003 Loss. This is evident from the face of the Policy Slip, which repeatedly interrelates the "payback" and the Loss, and the testimony of both Mr. White and Mr. Rock that the supposed "payback" premium was to be paid by PinnOak from the "settlement funds" because PinnOak "would then have the cash available to pay the additional premium."[28]

It is also undisputed that the Policy Slip was entered into ***nearly two years before*** entry into the Global Settlement Agreement and Release. The Policy Slip, therefore, is a "prior" agreement that is superseded by the terms of the Global Settlement Agreement and Release, as a result of the foregoing the "entire agreement/merger" clause. To this day, Heritage and Talbot offer no direct rebuttal to the applicability of this clause.[29] On this basis alone, the Circuit Court was well within its discretion in concluding that the terms of the Global Settlement Agreement and Release applied to bar Heritage and Talbot's breach of contract claim.

2. As the Circuit Court Found, the "Anti-Reimbursement/Contribution" Provision in the Global Settlement Agreement and Release Bars Heritage and Talbot's Demand for Partial Reimbursement of the May 2006 Settlement Proceeds

The "anti-reimbursement/contribution provision" in the Global Settlement Agreement and Release provides as follows:

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[28] White Affidavit, ¶¶ 5-7, 9; Rock Affidavit, ¶¶ 6, 10.

[29] It is, of course, well-settled that West Virginia courts enforce "entire agreement/merger" clauses. *See, e.g., Frederick Business Properties v. Peoples Drug Stores*, 191 W.Va. 235, 243, 445 S.E.2d 176, 184 (1994) (concluding that a merger clause was one of three express terms in an agreement that conflicted with appellant's attempt to imply a restrictive covenant in the agreement).

> ***The insurers shall not, under any legal theory, seek reimbursement of, or contribution toward, the advances and sum to be paid to PinnOak*** [pursuant to the settlement agreement], from any other insurers or from any other present or former party to the Coverage Action, except with respect to reinsurers pursuant to reinsurance agreements, contracts or relationships.

Global Settlement Agreement and Release, ¶ 8 (emphasis added).

The Policy Slip on its face provides that the "payback" referred to therein was to be funded by and relates to what became the May 2006 settlement sum. Both Mr. White and Mr. Rock admit, moreover, that the supposed "payback" premium was to be paid by PinnOak from the "settlement funds" because PinnOak "would then have the cash available to pay the additional premium."[30] Accordingly, Heritage and Talbot's breach of contract claim clearly is an attempt to seek "reimbursement of, or contribution toward" the settlement sum paid to PinnOak, and is therefore barred by the "anti-reimbursement/contribution" provision in the Global Settlement Agreement and Release.[31] To this day, Heritage and Talbot offer no direct rebuttal to this point. Again, on this basis alone, the Circuit Court was well within its discretion in concluding that Heritage and Talbot's breach of contract claim is barred by the Global Settlement Agreement and Release.

3. As the Circuit Court Found, Heritage and Talbot Released and Waived Their Alleged "Payback" Claim in the Global Settlement Agreement and Release

Finally, Heritage and Talbot agreed in the Global Settlement Agreement and Release to release and discharge PinnOak from:

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[30] White Affidavit, ¶¶ 5-7, 9; Rock Affidavit, ¶¶ 6, 10.

[31] White Affidavit, ¶¶ 5-7, 9; Rock Affidavit, ¶¶ 6, 10. Heritage and Talbot do not and could not make any argument that the reinsurance exception set forth in the "anti-reimbursement/contribution" provision applies.

> ***all actions, or cause or causes of action,*** whether in contract or tort . . . suits, debits, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, admiralty and equity, ***which the Insurer Releasors ever had, now have, or hereafter can, shall or may have, for, upon or by reason of the Loss.***

Global Settlement Agreement and Release, ¶ 4 (emphasis added).

The Policy Slip on its face provides that the "payback" referred to therein relates to and was to be funded by what became the May 2006 settlement sum. Both Mr. White and Mr. Rock admit, moreover, that the supposed "payback" premium was to be paid by PinnOak from the "settlement funds" because PinnOak "would then have the cash available to pay the additional premium."[32]

Accordingly, Heritage and Talbot's breach of contract claim without question is a cause of action they allegedly have "for, upon or by reason of" the August 2003 Loss, and is barred by the release provision in the Global Settlement Agreement and Release.[33] The exact timing of the "payback" or the "payback" claim, moreover, is irrelevant given the "can, shall or may have" language of the release quoted above. To this day, Heritage and Talbot offer no direct rebuttal to this point, other than a discourse on the term "Loss" which, as discussed in Section II.C below, is irrelevant to operation of the foregoing provision even if otherwise true. Once again, on this basis alone, the Circuit Court was well within its discretion in concluding that Heritage and Talbot's breach of contract claim is barred by the Global Settlement Agreement and Release.

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[32] White Affidavit, ¶¶ 5-7, 9; Rock Affidavit, ¶¶ 6, 10.

[33] White Affidavit, ¶¶ 5-7, 9; Rock Affidavit, ¶¶ 6, 10.

In addition, as the Circuit Court found, the "indemnification" provision in the Global Settlement Agreement and Release further emphasizes the intent of the parties to walk away from all prior dealings. This provision provides as follows:

> Each of the Insurers, and VeriClaim, shall protect, indemnify, and save PinnOak . . . by policy number only, harmless from and against any and all claims, demands, liabilities and causes of actions ***of every kind and character brought by any party purporting to or attempting to assert any claim by, through, or on behalf of any of the Insurers*** . . . growing out of, or resulting directly ***or indirectly*** from, the Loss.

Global Settlement Agreement and Release, ¶ 7 (emphasis added). Although this particular provision by itself does not bar the First Amended Complaint, it does emphasize that the Global Settlement Agreement and Release was intended to fully and finally resolve all disputes between the parties, including the dispute alleged in the First Amended Complaint, such that the parties would "walk away" from anything relating even "indirectly" to the August 2003 Loss, as recognized by the Circuit Court.[34] Even Heritage and Talbot admit, as they must, that the Policy Slip at least "indirectly" relates to the August 2003 Loss.

C. Heritage and Talbot's Interpretation of the Policy Slip is Irrelevant, Does Not Create Any Issues of Material Fact and Is Unreasonable

Faced with at least three provisions in the Global Settlement Agreement and Release that independently bar their breach of contract claim (and collectively completely obliterate it), Heritage and Talbot have no choice but to argue that the Circuit Court's interpretation of the term "payback" in the Policy Slip – namely, that it refers to a payback of a portion of the May 2006 settlement sum by PinnOak to Heritage and Talbot – was erroneous.

[34] Summary Judgment Order, ¶¶ 15, 30.

The problem for Heritage and Talbot, however, is that the face of the documents, and their own purported witnesses, expressly confirm the Circuit Court's conclusion in this regard. Thus, Heritage and Talbot spend most of their Brief raising a number of supposed "issues" that are irrelevant, in some cases absurd, and based on legal argument improperly included in the White and Rock Affidavits.

According to Heritage and Talbot, the "payback" term in the Policy Slip instead refers to a payback by PinnOak of a "deferred premium" for the coverage detailed in the Policy Slip and has nothing to do with the August 2003 Loss. Appellants' Brief, pp. 20-24. In support of this interpretation, Heritage and Talbot make the following arguments:

- The Policy Slip states only that PinnOak must payback a premium, not settlement monies, and at a minimum, the Circuit Court should have allowed for additional discovery on the issue;
- The Circuit Court's interpretation of "payback" is contradicted by the testimony in the White and Rock Affidavits;
- The Circuit Court failed to consider Heritage and Talbot's "deferred premium" argument;
- The Policy Slip is not specifically identified in the Global Settlement Agreement and Release; and
- Heritage and Talbot did not receive any consideration for supposedly releasing their right to their share of the $6.25 million payback.

Appellants' Brief, generally.

As discussed below, none of these arguments creates a material issue of fact that requires the reversal of the Circuit Court's ruling. Instead, these arguments are circular, tend to assume their conclusions and are an attempt to obfuscate, confuse and evade the express terms of the Policy Slip and the operative provisions of the Global Settlement Agreement.

1. There is No Distinction Between the Payback of a Premium and the Payback of Settlement Monies, Even Under Heritage and Talbot's View of the Facts

Heritage and Talbot argue that the Circuit Court erred because the Policy Slip "does not state that PinnOak must payback settlement monies . . . the Policy only states that PinnOak must payback a premium." Appellants' Brief, p. 16. That argument is obscure given that PinnOak was the insured and insureds do not receive premium that can be "paid back."

In any case, the Heritage and Talbot view is based on the false premise that there is, in fact, a distinction between the payback of a premium on the one hand and the payback of a portion of the settlement monies on the other hand. In purported support of their argument, Heritage and Talbot point out that the words "IRO PAYBACK PREMIUM" are handwritten under the Talbot signature line on the Policy Slip. Appellants' Brief, p. 17, 23. It is evident from the express terms of the Policy Slip, however, and Heritage and Talbot's own version of events, that in 2004 the parties viewed the supposed "payback" premium and what became the May 2006 settlement monies as the *same thing*.

The White and Rock Affidavits expressly confirm that view as well, in that both gentlemen admit what is manifest from the Policy Slip's express terms: the supposed "payback" premium was to be paid by PinnOak from the "settlement funds" because PinnOak "would then have the cash available to pay the additional premium."[35]

2. Heritage and Talbot Utterly Failed to Meet This Court's Mandates Regarding Summary Judgment and to Make Timely and Proper Requests for Discovery

In apparent recognition of the substantive invalidity of their position, Heritage and Talbot insinuate, quite unfairly, that the Circuit Court erred in refusing to allow them an opportunity to

[35] White Affidavit, ¶¶ 5-7, 9; Rock Affidavit, ¶¶ 6, 10.

conduct discovery related to the meaning of the term "payback." Appellants' Brief, pp. 18-19. As Heritage and Talbot well know – and as discussed in Section I.C above – the Circuit Court granted their request to present evidence (the White Affidavit) in opposition to PinnOak's summary judgment motion on precisely the terms they requested.[36] Heritage and Talbot ***never requested any other additional discovery*** in opposition to PinnOak's summary judgment motion. Even when they filed their Rule 59(e) Motion, Heritage and Talbot ***did not submit any additional evidence*** with that motion, nor did they make a submission for additional discovery as expressly required by Rule 56(f). Only ***later***, just two days before oral argument on their Rule 59(e) Motion, did Heritage and Talbot submit the Rock Affidavit, despite the present attempt in their Brief to make it appear as though the Circuit Court ignored or gave no opportunity for evidentiary submissions.[37] Even at the Rule 59(e) hearing, Heritage and Talbot made no proper Rule 56(f) continuance request – which must be supported by affidavit as discussed below – but rather made only an unsubstantiated oral request for "limited discovery."[38]

Rule 56(a) mandates that summary judgment "shall be entered" unless the non-movant comes forward with legitimate evidence or a proper Rule 56(f) request. This Court, beginning in *Powderidge Unit Owners Assoc. v. Highlands Properties, Ltd.*, 196 W. Va. 692, 699, 474 S.E.2d 872, 879 (1996), has repeatedly emphasized that summary judgment ***must*** be granted absent such action by the non-movant. For example, in *Browning v. Halle*, this Court reiterated that:

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[36] February 23, 2007 Transcript, pp. 20-21, 25.

[37] The untimely submission of the Rock Affidavit violated, *inter alia,* W. Va. Trial Court Rules, Rule 6.01(c) ("Except by permission or order of the court, no pleading shall be filed less than forty-eight (48) hours prior to oral presentation or argument of a proceeding.").

[38] June 15, 2007 Transcript, p.4.

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Browning v. Halle, 219 W. Va. 89, 632 S.E.2d 29, 33, 34-35 (2005) (internal citation omitted); *see also Jackson v. Putnam Co. Bd. of Educ.*, 653 S.E.2d 632, 640, 221 W.Va. 170 (2006).

Heritage and Talbot therefore were required to establish genuine issues of material fact (or submit an affidavit explaining why additional discovery is necessary) ***at the time of their opposition to PinnOak's summary judgment motion.*** Thus, even if the Rock Affidavit did create some genuine factual issue – which it does not – it was improper for Heritage and Talbot to have submitted that Affidavit well after the Circuit Court already had ruled on the motion. *See, e.g., Powderidge,* 196 W. Va. at 699, 703-07, 474 S.E.2d at 879, 883-87 (rejecting evidence submitted with "motion for reconsideration" after summary judgment was granted, and holding that that "our review is limited to the record as it stood before the circuit court ***at the time of its ruling***"; also noting that the non-moving party did not avail itself of a Rule 56(f) request for additional discovery and expressing concern that Rule 56(e) not "become[] meaningless") (emphasis added); *Jackson*, 653 S.E.2d at 640 (same; particular policy manual "was not a part of the record before the Circuit Court and was not made a part of the record by the Appellants when opposing the summary judgment motion"); *Browning,* 632 S.E.2d 29 at 33 (rejecting evidence submitted, after summary judgment was granted, with Rule 59(e) and Rule 60(b) motion; noting that the non-moving party "was at liberty to raise [certain evidence] in a properly filed response to the motion for summary judgment, which it did not do," and "improperly sought to introduce [the evidence] after the grant of summary judgment").

In fact, the inaction of Heritage and Talbot is even less explicable than that of the non-movants in *Browning* and *Powderidge*, because they did not submit the Rock Affidavit until ***after*** they made their Rule 59(e) Motion, despite having months to submit affidavit or other evidence.

As discussed above, moreover, Heritage and Talbot ***never submitted a Rule 56(f) affidavit*** explaining why further discovery was necessary. As this Court unequivocally stated in *Powderidge*:

> [A] litigant departs from the plain language [of Rule 56(f)] at his or her peril. Counsel desirous of forestalling the swinging of the summary judgment axe would do well to heed the tenor and spirit of the criteria we establish below. ***When a departure occurs, the alternative proffer must simulate the rule in important ways. Ordinarily, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, then in some authoritative manner by the party under penalty of perjury or by written representations of counsel subject to Rule 11 of the West Virginia Rules of Civil Procedure and filed with the circuit court.*** At a minimum, the party making the motion for a continuance must satisfy four requirements. It should (1) articulate some ***plausible basis*** for the party's belief that ***specified " discoverable" material facts likely exist which have not yet become accessible to the party***; (2) demonstrate some ***realistic prospect*** that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue ***both genuine and material***; and (4) demonstrate ***good cause for failure to have conducted the discovery earlier.***

Powderidge, 196 W. Va. at 702, 474 S.E.2d at 882 (emphasis added). Heritage and Talbot's failure to even attempt to meet the *Powderidge* standards for a Rule 56(f) continuance is fatal to their argument that the Circuit Court erred in refusing to allow them additional discovery.

3. The White and Rock Affidavits are Parol Evidence That May Not Vary the Terms of the Slip or the Global Settlement Agreement and Release

Heritage and Talbot argue that the Circuit Court erred because its interpretation of the term "payback" is contradicted by the testimony in the White and Rock Affidavits. Those affidavits, to the extent offering factual statements as opposed to legal argumentation, confirm the Circuit Court's analysis. *See* Sections II.B above and II.C.4 below.

In any case, to the extent the White and Rock Affidavits purport to offer testimony varying the terms of the Policy Slip or the Global Settlement Agreement and Release, that testimony is barred by the parol evidence rule. Under the parol evidence rule:

> [A] written contract merges all negotiations and representations which occurred before its execution, and in the absence of fraud, mistake, or material misrepresentations, ***extrinsic evidence cannot be used to alter or interpret language in a written contract*** which is otherwise plain and unambiguous on its face.

Warner v. Haught, Inc., 174 W. Va. 722, 728, 329 S.E.2d 88, 94 (1985) (emphasis added). *See also Yoho v. Borg-Warner Chemicals*, 185 W. Va. 265, 268, 406 S.E.2d 696, 699 (1991) (extrinsic evidence not admissible to "explain the meaning" of settlement agreement term even if party seeking to admit such evidence "did not adequately consider the appropriate terms for its settlement agreement before signing it"); *Haymaker v. General Tire Inc.*, 187 W. Va. 532, 534, 420 S.E.2d 292, 294 (1992) ("It is abundantly clear that the parol evidence rule is applicable as between the parties to a release when its terms are clear and unambiguous.").[39]

Heritage and Talbot have never made any allegation of fraud, mistake or material misrepresentation with respect to the Policy Slip or the Global Settlement and Release, nor do they even appear to argue directly that those documents contain a pertinent ambiguity. As the Circuit Court properly concluded, the terms of those documents are clear and unambiguous,[40] and parol evidence in the form of the White and Rock Affidavits cannot be used to vary the provisions therein. *See Warner, Yoho and Haymaker, supra.*

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[39] Under West Virginia law, "the term 'ambiguity' is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." *Estate of Tawney v. Columbia Natural Resources*, 219 W.Va. 266, 268, 633 S.E.2d 22, 24 (2006) (internal citation omitted).

[40] Summary Judgment Order, ¶ 28.

4. The White and Rock Affidavits Are Not Based on Personal Knowledge In Numerous Respects

Rule 56(e) of the West Virginia Rules of Civil Procedure provides that:

> [A]ffidavits shall be made on ***personal knowledge***, shall set forth such facts as would be ***admissible in evidence***, and shall show affirmatively that the affiant is ***competent to testify*** to the matters stated therein.

W.Va.R.Civ.P. 56(e) (emphasis added).

Heritage and Talbot repeatedly cite statements from the White and Rock Affidavits, as if those statements had legitimate evidentiary value. In fact, however, both Mr. White and Mr. Rock lack personal knowledge of matters that are critical to Heritage and Talbot's theory of the case, as the Circuit Court itself noted (*see* "Counterstatement of the Case" above).[41]

For example, Mr. White lacks personal knowledge of any facts that would be admissible in evidence to interpret the provisions of the Policy Slip or the Global Settlement and Release. Specifically:

- Mr. White makes no claim to have participated in the 2004 insurance renewal "payback" discussions at issue in the First Amended Complaint;
- Mr. White makes no claim to have participated in the drafting of the 2004 Policy Slip, which contains the alleged "payback" agreement at issue in the First Amended Complaint;
- Mr. White makes no claim to have participated in any of the 2006 discussions that resulted in the Global Settlement Agreement and Release; and
- Mr. White makes no claim to have participated in the drafting of the Global Settlement Agreement and Release.[42]

[41] Summary Judgment Order, ¶ 19.

[42] White Affidavit, generally. Mr. White also has no personal knowledge as to why PinnOak refused to pay the premium allegedly due when the Coverage Action settled. Yet even now, Heritage and Talbot continue to insinuate, based solely on a broker email attached to the White Affidavit – an email to which

(Footnote continued on next page...)

Mr. Rock, apart from the untimely nature of his Affidavit, also lacks first hand knowledge of matters critical to Heritage and Talbot's theory of the case. For example, Mr. Rock purports to interpret the meaning of the words "IRO PAYBACK PREMIUM," which allegedly were written on the Talbot syndicate signature line at the end of the Policy Slip by a Talbot representative. Notably, however, Mr. Rock could have no personal knowledge as to what the handwritten notation means because:

- Mr. Rock is an underwriter at the Heritage syndicate, ***not the Talbot syndicate***, and handwriting in question is ***not his or even that of someone at his syndicate***.[43]

- Mr. Rock makes no claim to have spoken with the author about the meaning of those words.[44]

Mr. Rock also states that the Policy Slip was "drafted" and "proposed" by an insurance broker, Prentis Donegan.[45] If, however, the broker drafted the Policy Slip, then it is entirely unclear how Mr. Rock would have personal knowledge of the meaning of the Policy Slip terms. Although Heritage and Talbot claim that Mr. Rock testifies the "payback" and "payback premium" terms were "words of art chosen, at the time, to reflect the Lloyd's Underwriters' thought processes" (*see* Appellants' Brief, p. 20), the Rock Affidavit says no such thing, and presumably could not given its claim that Lloyd's did not draft the Policy Slip.

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neither Mr. White nor anyone from PinnOak is a party – that PinnOak refused to pay the premium based on some reason other than the Global Settlement Agreement and Release. Appellants' Brief, pp. 10-11; White Affidavit, ¶¶ 14-15.

[43] Rock Affidavit, ¶¶ 1-2, 15.

[44] Rock Affidavit, generally. No affidavit has been submitted from anybody at the Talbot syndicate addressing the Talbot authored language in the Policy Slip.

[45] Rock Affidavit, ¶¶ 11, 16.

5. Heritage and Talbot's Allegations Regarding the Parties' Alleged Negotiating History and the "Deferred Premium" Are Barred by the Parol Evidence Rule, But In Any Event Support the Circuit Court's Analysis If Interpreted Reasonably

Heritage and Talbot also argue that the Circuit Court erred by failing to consider the negotiating history behind the Policy Slip. According to Heritage and Talbot, that negotiating history is evidence that the parties intended the payment made thereunder simply to be a "deferred premium" that somehow was unrelated to the settlement of the August 2003 Loss. Specifically, Heritage and Talbot claim that, in the spring of 2004, the parties initially negotiated a one year period of coverage that had a one-time up front payment and did not include the term "payback." They also claim that subsequently, by June 2004, this arrangement was modified to what is set forth in the Policy Slip, *i.e.*, five years of coverage in renewable one year segments, with $375,000 payable "annually" and the full "payback" (apparently of $6,250,000) due "on settlement of the August 2003 loss," when "PinnOak had better cash flow" as a result of what became the Coverage Action settlement payment. Appellants' Brief, pp. 8-10, 20-21.

Of course, as discussed in Section II.C.5 above, the negotiating history behind the Policy Slip falls squarely within the scope of – and consequently is barred by – the parol evidence rule under *Warner*, *Yoho* and *Haymaker*.

In any event, the Circuit Court's Summary Judgment Order reflects that it was aware of the pertinent alleged negotiated terms, and moreover, the supposed negotiating history supports the Circuit Court's reasoning even as now recounted in Heritage and Talbot's Brief. For example, the Circuit Court quotes in its Summary Judgment Order the provisions of the Policy Slip that set forth the premium as "$375,000 payable 'Annual' to Lloyd's . . . Plus USD

1,250,000 . . . Payback Annual, payable on settlement of the August 2003 loss."[46] The Circuit Court also noted in its "Findings of Fact" that, in accordance with the Heritage and Talbot allegations, the "first of these installments [of $1,250,000] only became payable on settlement of the August 2003 loss."[47]

It is inexplicable that Heritage and Talbot seem to attach great significance to the initial one year insurance arrangement supposedly negotiated in the spring of 2004. After all, on its face, that arrangement simply confirms the Circuit Court's analysis – *i.e.*, the initial arrangement ***did not mention "payback" precisely because it contemplated a one-time up front payment and, therefore, no funding from or interrelationship with what later became the settlement sum***.

The Circuit Court did not misapprehend or ignore Heritage and Talbot's "deferred premium" argument or the negotiating history. Instead, to evade the devastating inconsistencies between their breach of contract claim on the one hand, and the unambiguous language of the Policy Slip, Global Settlement Agreement and Release, and White and Rock Affidavits on the other, Heritage and Talbot continually generate unreasonable and internally contradictory "interpretations" of the documents so as to confuse and obfuscate the issues. Some illustrations of the lack of logic of Heritage and Talbot's positions are set forth below.

First, the phrase "deferred premium" appears nowhere on the Policy Slip – compared to the ***four*** references contained therein to "payback."[48]

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[46] Summary Judgment Order, ¶ 10 (quoting the Policy Slip).

[47] Summary Judgment Order, ¶ 5.

[48] By Heritage and Talbot's own reasoning, because the Policy Slip does not ***specifically refer*** to a "deferred premium," it would be improper to infer such an interpretation. *See* Appellants' Brief, p.16

(Footnote continued on next page...)

Second, whether one describes the premium as "deferred" or an "installment" or a "payment plan" or something else, any premium by its nature would have been owed ***by*** PinnOak (the insured) ***to*** Lloyd's (the insurer). Therefore, as the Circuit Court concluded, it would be a wholly unnatural use of language to call a premium – even a "deferred" or "installment" premium – a "payback" ***from*** PinnOak ***to*** Lloyd's.[49] PinnOak cannot "payback" something it was paying to Heritage and Talbot in the first place, and no monies are alleged to have flowed from Heritage and Talbot to PinnOak.

Third, Heritage and Talbot's claim that the Circuit Court "allowed PinnOak to walk away from its deferred payment obligation" (Appellants' Brief, p. 21) is another perplexing position in light of their own alleged course of dealing with PinnOak. According to Heritage and Talbot, what was supposedly going to be five annual periods of coverage under the June 2004 Policy Slip was canceled in June 2005, after one year, and the Coverage Action settlement was entered into about one year later, in May 2006. One could just as easily say that Heritage and Talbot asked the Circuit Court to unjustly enrich them with *almost the entire amount* of what they claim is "premium" despite not providing, for whatever reason, four of the five years of coverage originally contemplated.

Fourth, and on a related note, it would be irrational for an insured to pay millions of dollars in pure "premiums" for nothing in return, *i.e.*, for four years of coverage that had just been canceled. Presumably it would be preferable to retain the coverage if the same or almost the same amount is being paid by the insured in any case. Yet Heritage and Talbot are forced to

("Thus, since the Policy does **not** state that PinnOak must payback settlement monies, the Court should not have drawn such a conclusion . . . .") (emphasis in original).

[49] *See* Summary Judgment Order, ¶¶ 13, 29-30.

take the position that the Policy Slip mandates such an illogical scenario, because otherwise they would be admitting that the Policy Slip seeks precisely what was prohibited in the subsequent "Global Settlement Agreement and Release" – *i.e.*, a kick back (or "pay back") to them of the May 2006 Coverage Action settlement sum.[50]

6. It Is Immaterial that the Policy Slip Is Not Specifically Identified in the Global Settlement Agreement and Release

Heritage and Talbot argue that the fact that the Policy Slip is not specifically identified in the Global Settlement Agreement and Release is evidence of the parties' intention that the agreement apply only to claims asserted in the Coverage Action. More specifically, Heritage and Talbot state that (1) a "whereas" clause in the Global Settlement Agreement and Release describes the "loss" as PinnOak's "claim for business interruption and other losses . . . as well as PinnOak's claims of bad faith" and does not refer specifically to the Policy Slip and (2) the Policy Slip is not included in the list of insurance policies identified in the definition of "Loss" in the Global Settlement Agreement. Appellants' Brief, pp. 25-29. This argument, however, is specious and does not create a material issue of fact.

The Circuit Court was perfectly aware of the definition of "Loss" from the Global Settlement Agreement and Release.[51] The Circuit Court was also aware, however, that the definitional provisions and "whereas" clauses in the Global Settlement Agreement and Release have no meaning independent of the substantive operative provisions contained therein, including the merger/entire agreement, release, anti-reimbursement/contribution and indemnity

[50] Under the Policy Slip, the total premiums for five years of coverage, according to Heritage and Talbot, would be $8,125,000 (five times $375,000 plus five times $1,250,000). *See* Appellants' Brief, pp. 9-10, 21 & n. 44.

[51] Summary Judgment Order, ¶¶ 28-30.

provisions. Tellingly, none of those provisions are ever actually analyzed in the "Discussion of Law" portion of Heritage and Talbot's Brief. Instead, Heritage and Talbot's legal discussion about the term "Loss" takes place in a complete vacuum and simply begs the question of what the operative substantive provisions of the Global Settlement Agreement and Release actually provide for.

As noted by the Circuit Court, the language of these substantive provisions is far broader than the claims made in the Coverage Action and operates to release all prior dealings, histories, subjects, disputes and issues of the parties, not just specific insurance policies.[52] Thus, it is immaterial whether the Policy Slip is specifically mentioned in the Global Settlement Agreement and Release: on its face, the Agreement is "global" and expressly supersedes all prior agreements of the parties, which includes the Policy Slip entered into two years earlier.

As is evident from its title, language and structure discussed above, the Global Settlement Agreement and Release does not aggregate specific items to arrive at "the deal between the parties," but rather encompasses the ***entire universe*** of dealings among the parties. Significantly, although certain exceptions are specifically identified in the Agreement, ***no exception is made for the Policy Slip that preceded the May 2006 Global Settlement Agreement and Release by two years.*** Heritage and Talbot are commercially sophisticated parties who were represented by able and experienced counsel. If they had wanted to create an exception for the Policy Slip – as they did with respect to certain reinsurance arrangements, for instance – they could and should have done so.

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[52] Summary Judgment Order, ¶ 28.

Accordingly, Heritage and Talbot's attempt to find error in the Circuit Court's conclusions by distorting and narrowing the language, scope and intent of the substantive provisions of the Global Settlement Agreement and Release must be rejected, as they have failed to establish that the Circuit Court abused its discretion in dismissing their claim.

7. There is No Evidence that Heritage and Talbot Did Not Receive Consideration for Releasing Their Share of the Payback

Lastly, Heritage and Talbot argue that they did not receive any consideration for supposedly releasing in May 2006 their right to their share of the $6,250,000 "payback" and, therefore, that they did not, in fact, release this right. Appellants' Brief, pp. 30-32. Heritage and Talbot's "lack of consideration" argument is unsubstantiated by any evidence of record and, therefore, must be rejected.

The only evidence Heritage and Talbot point to in support of this argument is the White Affidavit. Mr. White was not, however, involved in any aspect of the negotiations leading up to the Global Settlement and Release. Neither he (nor for that matter Mr. Rock) claim to have any idea, or even to have spoken to anyone who has any idea, about how the settlement sum was arrived at or what it did or did not reflect. In fact, ***nowhere does Mr. White actually state that Heritage and Talbot did not receive any consideration for releasing their share of the payback***.

Instead, Mr. White states circumspectly that "Heritage and Talbot did not receive any discount off the $56,000,000 settlement amount" and "paid the same proportionate share as the other nine Syndicates."[53] The White Affidavit is completely silent, however, about (a) whether,

[53] White Affidavit, ¶ 13 (mistakenly cited by Heritage and Talbot as ¶ 14, on page 17 of the Rule 59(e) Motion). Mr. White's Affidavit does not preclude the possibility that Heritage and Talbot received some form of consideration other than a "discount off the $56,000,000 settlement amount."

and if so to what extent, those other nine settling syndicates ***also*** participated in the Policy Slip (that is, underwrote the 60% of the total Policy Slip coverage that apparently was insured by persons other than Heritage and Talbot), and therefore (b) ***were*** "in the same position" as Heritage and Talbot, contrary to the argument now advanced in their Brief.

For all Mr. White knows, the parties agreed to settle at $56 million, as opposed to a other number, because they believed that any "payback" claim was being extinguished by the Global Settlement Agreement and Release or had previously been extinguished as a result of the Policy Slip being canceled. Once again, it is evident that Heritage and Talbot are essentially assuming their own conclusion.

D. To Permit the First Amended Complaint to Stand Would Be to Contravene West Virginia's Long-Standing Public Policy of Favoring and Encouraging Settlements

As noted by this Court in *Berardi*, which established an abuse of discretion standard for enforcing a settlement agreement, "settlements are highly regarded and scrupulously enforced." *Berardi*, 212 W.Va. at 382, 572 S.E.2d at 905. Indeed, West Virginia public policy favors settlements as a "means of promoting judicial economy and facilitating the resolution of contested cases." *Horace Mann Ins. Co. v. Adkins*, 215 W. Va. 297, 303, 599 S.E.2d 720, 726 (2004). "The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law [of West Virginia] to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." *Sanders v. Roselawn Mem'l Gardens*, 152 W. Va. 91, 159 S.E.2d 784, 785 (1968) (Syllabus Point 1); *see also DeVane v. Kennedy*, 205 W. Va. 519, 534, 519 S.E.2d 622, 637 (1999) (reiterating that "settlements are highly regarded and scrupulously enforced, so long as they are legally sound"); *Clark v. Kawasaki Motors Corp.*,

U.S.A., 200 W. Va. 763, 768, 490 S.E.2d. 852, 857 (1997) (referring to "the policy of this State favoring out-of-court settlements").

Here, however, Heritage and Talbot are seeking to unwind the settlement of the hard fought Coverage Action before the Circuit Court, based solely on an alleged agreement pre-dating the settlement by nearly two years, for renewal insurance policies canceled about a year before the settlement. The language of the Global Settlement Agreement and Release is clear and unambiguous, and the First Amended Complaint nowhere alleges mistake, fraud or material misrepresentation.

To permit the First Amended Complaint to stand under these circumstances would be to significantly undermine West Virginia's pro-settlement policy and the integrity of settlements in general. Litigants will be very wary of entering into settlements if, months after entering into a "walk away" arrangement, they can be dragged back into court based not on any new developments, but rather on the prior history that was supposed to be resolved by the settlement in the first place.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in PinnOak's submissions to the Circuit Court, PinnOak respectfully requests that this Court affirm the Circuit Court's rulings below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **APPELLEES' BRIEF** is being served upon the following counsel for Appellants this 4th day of June, 2008 via first class U.S. Mail:

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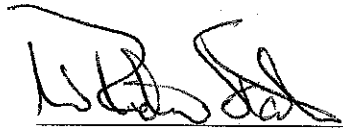

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